APL Logistics, Inc. *and* International Chemical Workers Union Council of the UFCW, AFL–CIO–CLC. Case 9–CA–40905

May 24, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge and an amended charge filed on February 24 and March 17, 2004, respectively, the General Counsel issued the complaint on March 19, 2004, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 9–RC–17821. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer and a first amended answer admitting in part and denying in part the allegations in the complaint.

On April 6, 2004, the General Counsel filed a Motion for Summary Judgment and Memorandum in Support. On April 9, 2004, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the certification on the basis of its objections in the representation proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. In its answer and response to the Notice to Show Cause, the Respondent urges the Board to order a hearing to consider "newly discovered and previously unavailable evidence" pertaining to its Objection 1, which alleged that the Union, by its agents, threatened employees in order to coerce them to vote for the Union. The alleged "newly discovered evidence" which the Respondent seeks to offer is testimony presented by Michelle Gehm, the Union's election observer, in a proceeding before another administrative agency. The Respondent contends that this testimony establishes, contrary to the decision of the hearing officer in the representation proceeding, that Gehm was acting as an agent of the Union when she allegedly made threatening statements that were the subject of the Respondent's Objection 1.

We find no merit in the Respondent's contention. The proffered evidence is not newly discovered and previously unavailable, nor would such evidence, if adduced, establish special circumstances. Newly discovered evidence is evidence of facts in existence at the time of the hearing which could not be discovered by reasonable diligence.[1] In addition, in order to warrant a further hearing, the newly discovered evidence must be such that if adduced and credited it would require a different result. See Section 102.48(d)(1) of the Board's Rules and Regulations.

The Respondent has offered nothing beyond its bare assertion to establish that the proffered evidence is newly discovered and previously unavailable. It does not state when Gehm's testimony was given; when the testimony was discovered; or why, through the exercise of reasonable diligence, it could not have discovered the testimony earlier. Moreover, Gehm's testimony presumably concerns facts that were in existence at the time of the representation hearing.[2] The issue of Gehm's agency status was fully litigated at the hearing, and the Respondent has not shown why it could not have developed the same facts at that time. Thus, the Respondent has not shown that it has "newly discovered evidence" in the sense that such evidence could not have been uncovered with reasonable diligence during the hearing and offered into evidence.

Finally, in overruling the Respondent's Objection 1, we adopted the hearing officer's credibility based finding that Gehm did not make the threatening statements that were the subject of the objection.[3] Accordingly, even assuming the proffered evidence is newly discovered, the Respondent has failed to show that it would require a different result.

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[1] *Seder Foods Corp.*, 286 NLRB 215, 216 (1987); *NLRB v. Jacob E. Decker & Sons*, 569 F.2d 357, 363–364 (5th Cir. 1978) ("facts implying reasonable diligence must be provided" by the party alleging evidence is newly discovered).

[2] To the extent that Gehm's testimony pertains to facts arising after the hearing, it does not constitute newly discovered evidence. *Machinists Lodge 91 (United Technologies)*, 298 NLRB 325 fn. 1 (1990), enfd. 934 F.2d 1288 (2d Cir. 1991).

[3] Chairman Battista and Member Schaumber relied solely on this finding in overruling Objection 1. In addition to the finding that the allegedly objectionable conduct had not occurred, Member Liebman also relied on the hearing officer's findings that Gehm was not an agent of the Union and that, even if the alleged conduct occurred, it was not objectionable.

We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation, has been engaged in the business of warehousing and providing logistical services from its Shepherdsville, Kentucky facility.

During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its operations described above, performed services valued in excess of $50,000 for Dow Corning, an enterprise located within the Commonwealth of Kentucky, which is directly engaged in interstate commerce.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the election held August 14, 2003, the Union was certified on January 7, 2004,[4] as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time warehousing employees employed by the Employer at its Shepherdsville, Kentucky facility, but excluding all office clerical employees, all employees employed by temporary agencies, all professional employees, administrative assistants, and guards and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

Since about January 28, 2004, the Respondent has failed and refused to recognize and bargain with the Union as the employees' exclusive collective-bargaining representative.[5] We find that the Respondent has thereby unlawfully refused to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By failing and refusing on and after January 28, 2004, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, APL Logistics, Inc., Shepherdsville, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Chemical Workers Union Council of the UFCW, AFL–CIO–CLC, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[4] The Respondent's answer denies that a representation election was held on August 14, 2003, and that the Board certified the Union on January 7, 2004. We find that neither of these denials warrants a hearing as uncontroverted record evidence attached to the General Counsel's motion establishes the allegations as to these matters.

[5] The Respondent's answer denies the complaint allegation that about January 28 and February 11, 2004, the Union, in writing, requested the Respondent to recognize and bargain with it. The General Counsel has not attached a copy of the Union's demand letters to the Motion for Summary Judgment. We find, however, that the Respondent's denial raises no issue warranting a hearing. See *University Park Living Center*, 328 NLRB 1172 fn. 2 (1999). It is clear from the Respondent's answer and its response to the General Counsel's motion that the Respondent is refusing to recognize and bargain with the Union based solely on its contention that it is under no legal obligation to do so because the certification is invalid.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time warehousing employees employed by the Employer at its Shepherdsville, Kentucky facility, but excluding all office clerical employees, all employees employed by temporary agencies, all professional employees, administrative assistants, and guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Shepherdsville, Kentucky, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 28, 2004.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. May 24, 2004

Robert J. Battista,	Chairman
Wilma B. Liebman,	Member
Peter C. Schaumber,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

> Form, join, or assist any union
> Choose representatives to bargain with us on your behalf
> Act together with other employees for your benefit and protection
> Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with International Chemical Workers Union Council of the UFCW, AFL–CIO–CLC as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

> All full-time and regular part-time warehousing employees employed by us at our Shepherdsville, Kentucky facility, but excluding all office clerical employees, all employees employed by temporary agencies, all professional employees, administrative assistants, and guards and supervisors as defined in the Act.

APL LOGISTICS, INC.